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Finding a Substitute for the Place-of-Wrong Rule: The Kentucky Experience

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The Court of Appeals of Kentucky has abandoned the sterile logic and illusory certainty[1] of the place-of-wrong rule and is now embarked on a search for new solutions to torts-conflicts problems. The Court's action epitomizes the genius of the common law—the ability to shape and reshape doctrine, case by case, in step with the inexorable forces of change generated by current social realities.

If there is one thing that the Court does not need or deserve it is carping and impatient criticism of its efforts to date. The academic specialist has the privilege of studying a particular legal problem over the span of his career. The judge, however, must move quickly from one area of the law to another. If the specialist can clearly and briefly make the fruits of his thinking available to the judge, the specialist can render a useful service. It is in this spirit of service that this symposium and this article is offered.

I shall first provide a background for my discussion of the Court's work by suggesting an approach to tort choice-of-law problems. Then I shall comment on the three recent conflicts cases[2] decided by the Court.

I. AN APPROACH TO TORT CHOICE-OF-LAW PROBLEMS.

The Court should first focus on the content of the domestic laws in putative conflict and on the purposes or policies underlying these laws. These policies should be sought with the same

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[1] The certainty of the rule was illusory because courts were increasingly substituting other characterizations for the "tort" label in order to reach results that could be explained only by largely unarticulated bases for the decisions. *See, e.g.*, Grant v. McAuliffe, 41 Cal.2d 859, 264 P.2d 944 (1953) ("procedure," "administration of estates"); Kilberg v. Northeast Airlines, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961) ("procedural," "public policy"); Haumschild v. Continental Cas. Co., 95 N.W.2d 814 (Wis. 1959) ("family law").

[2] Wessling v. Paris, 417 S.W.2d 259 (Ky. 1967); Arnett v. Thompson, 433 S.W.2d 109 (Ky. 1968); Foster v. Leggett, 484 S.W.2d 827 (Ky. 1972).

realistic lawyer-like care with which the Court would seek the purposes of a rule in a purely domestic case. Possible sources of information concerning policies include legislative history of statutes, statements by courts of the relevant state when applying the rule, statements by courts of other states concerning identical or similar rules, and statements by expert commentators discussing the rule. In this manner, the Court should be able to identify with substantial confidence one or more purposes underlying each of the domestic rules in issue.

Under no circumstances should the Court invent or imagine a policy that has no basis in anything said about the rule by the courts of the relevant state or by anyone else. This is what happened in *Dym v. Gordon*[3] when the New York Court of Appeals said that one policy underlying a guest statute was to preserve the host's assets for the claims of plaintiffs who were not guests.

The physical contacts between a state and the parties or the occurrence should then be evaluated solely in terms of the purposes of the rules in issue. In the light of a state's nexus with the case, would its policies be substantially and realistically, not officiously or hypothetically, advanced by applying its rule in adjudication? If two states have different rules covering the same issue, there is probably much that could be said in favor of the value and wisdom of either rule. Each rule is the product of weighing and balancing competing social values. It is not likely that any court or legislature would reach a completely irrational conclusion in this process of rule making. No state, however, should wish to impose its conclusion on another when the social impact of choosing rightly or wrongly will, so far as current nexus with the problem indicates, be felt solely in the other state.

At this point, many conflicts problems will be solved. Only one state's policies will seem to have any legitimate claim to application. There will be many cases, however, in which this is not so—in which the decision is likely to have substantial social consequences in each of two or more states. When this is so, the Court should employ neutral and objective bases for choosing between the competing rules. The Court should not base its decision on which state has the most physical contacts. A single

[3] 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

contact with the problem may make a state's policy highly relevant. There is no reason to assume that a state's policy is more legitimately or more strongly involved because it has more physical contacts related to its policy than does another state nor, once it is clear that at least two states have relevant policies, should the Court attempt to decide which state has the "greater interest." Such a conclusion is an attempt to quantify an abstraction. If it has any cogency, it is because of other bases that justify the decision. The following neutral principles are suggested for choosing between the relevant tort rules of two or more states.

The Court should start with a rebuttable presumption in favor of the rule that will permit or increase recovery. This is not because the Court is or should be biased in favor of plaintiffs. It is because the trend of development in the law of torts in every state has been toward recovery, toward distribution rather than concentration of the loss through the liability-insurance device. Choosing between the laws of two states on this basis will utilize a trend widely and generally shared by the two states although the states differ in the content of two specific and narrow tort rules. This presumption in favor of liability will then be strengthened or rebutted to the extent that, by the objective evidence of statutory and case developments, the number of states using one of the competing rules can be seen to be growing and the number utilizing the other rule to be diminishing. Again the focus is on objectively discernible shared trends rather than on a subjective or parochial evaluation of the competing rules. Another factor that will serve to rebut the presumption of liability is reliance by the defendant or his insurer on a rule favoring the defendant. If the effect of these trend and surprise factors is not clear, the presumption in favor of liability is not rebutted and should prevail.

The approach outlined above is a case method based upon analysis of the particular law-fact pattern before the Court, rather than a rules approach. A rules approach, like the place-of-wrong rule, is based on stating a priori that certain specific physical contacts with a state will determine the applicable law. There is no reason, however, why a case approach need be ad hoc, or lawless, or unpredictable. Predictability will emerge from the evolving pattern of adjudications and from the clear and candid articula-

tion of the bases for those adjudications.[4] There is, in fact, reason to believe that the predictability of such a system of adjudication will be greater than one based on apparently simple and rigid rules, which the Court must constantly manipulate to avoid unjust and irrational decisions.

II. WESSLING v. PARIS[5]

The approach to tort choice-of-law problems here suggested would produce the same result as that reached by the Kentucky Court of Appeals: application of the Kentucky negligence rule rather than the Indiana guest statute's "wanton or wilful misconduct"[6] rule, to determine the liability of the Kentucky host to the Kentucky guest for injuries resulting from the automobile accident in Indiana.

The Indiana cases do not contain extensive discussions of the policies underlying the Indiana guest statute. Insofar as policy analysis appears, it focuses on the desirability of shielding the host from the claims of his ungrateful guest.[7] If this is the sole purpose of the Indiana statute, then Kentucky and Indiana have come to different conclusions concerning the relative importance of compensating the injured guest and protecting the host from litigious guests. If Kentucky law is applied and Kentucky is wrong in its conclusion, a Kentucky host will feel the sting of ingratitude. If the Indiana statute is applied and Indiana is wrong, a Kentucky guest will go uncompensated. Kentucky has as much and Indiana has as little legitimate concern with applying their solutions to this interstate problem as they would to a problem having only Kentucky contacts.

A Note in the *Indiana Law Journal* suggests another purpose behind the Indiana guest statute—protecting the host's liability insurer from collusion between host and guest.[8] This anti-collusion

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[4] *See* Sedler, *Babcock v. Jackson in Kentucky: Judicial Method and the Policy-Centered Conflict of Laws*, 56 KY. L.J. 27 (1967).

[5] 417 S.W.2d 259 (Ky. 1967).

[6] IND. ANN. STAT. § 47.1021 (1965).

[7] *See, e.g.*, Blair v. May, 19 N.E.2d 490, 493 (Ind. App. Ct. 1939); Conconower v. Stoddard, 182 N.E. 466, 470 (Ind. App. Ct. 1932). These cases concerned an earlier version of the Indiana guest statute. *But see* Note, *The Indiana Guest Statute*, 34 IND. L.J. 338, 344 (1959) ("There is no appreciable difference in the factors which have been considered important in assessing liability of an automobile host under the two acts.").

[8] Note, *The Indiana Guest Statute*, 34 IND. L.J. 338, 340 (1959).

policy is frequently mentioned in scholarly discussions of guest statutes.[9] Protecting the liability insurer from collusion will keep down insurance rates. Any cost to Mr. Paris' insurer within the minimum requirements of the Kentucky financial responsibility law,[10] however, will be charged to the loss experience of the Kentucky rating district in which Mr. Paris' car is principally garaged and will affect the cost of basic insurance only in that district. Costs to the insurer exceeding these limits will go into a nationwide data pool and affect rates on insurance above the basic limits in all states, including Indiana, but no more than would recovery for a Kentucky accident involving only Kentucky parties.[11] Thus, insofar as an Indiana anti-collusion policy is designed to keep down liability insurance rates, Indiana can have no more concern in imposing its view here than it would in a case completely devoid of Indiana contacts. If Indiana fears the effect of host-guest collusion on the moral fiber of society or on the integrity of the judicial process, it is Kentucky that will feel the primary impact of the evil if Indiana is right, and experience the benefits of preferring compensation for the victim if Indiana is wrong. Application of the Kentucky ordinary negligence standard is the solution consistent with an evaluation of the legitimate reach of the policies underlying the Indiana and Kentucky rules.

III. ARNETT V. THOMPSON[12]

If the "Ohio" couple, the Arnetts, were what the Court's description, "residents of Ohio,"[13] connotes, application of the conflicts method outlined in section I would have produced a result opposite that reached by the Kentucky Court of Appeals. The Ohio guest statute and interspousal immunity rule would have been applied to preclude recovery by the Ohio guest-wife from her Ohio host-husband for the injuries she suffered as the

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[9] *See, e.g.*, 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 16.15 (1956); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 187 (4th ed. 1971).

[10] KY. REV. STAT. § 187.330(3) (1971) ($10,000 personal injury per person; $20,000 personal injury per accident; $5,000 property damage).

[11] *See* McNamara, *Automobile Liability Insurance Rates*, 35 INSURANCE COUNSEL J. 398, 401, 403-06 (1968); Stern, *Rate-making Procedures for Automobile Liability Insurance*, 52 PROCEEDINGS CASUALTY ACTUARIAL SOC'Y 139, 155, 176-77, 183 (1965).

[12] 433 S.W.2d 109 (Ky. 1968).

[13] *Id.* at 112.

result of the collision.[14] Investigation, however, has revealed facts only hinted at in the opening sentence of the opinion: "Carl A. Arnett and Edna his wife, residents of Ohio, while visiting relatives in Kentucky. . . ."[15] The Arnetts were native Kentuckians who were residing in Ohio for the time being because Mr. Arnett could find suitable employment there but not in Kentucky. They thought of themselves as Kentuckians, hoped to return to live in Kentucky as soon as employment conditions permitted, and returned "home" frequently to see relatives and friends. They remained in Kentucky after the litigation was concluded and are living there now.[16]

The Arnetts' close ties with Kentucky made it extremely likely that denial of compensation to the wife would have a significant impact within Kentucky. It was foreseeable that the Arnetts would soon resume their Kentucky residence. Therefore, if failure to compensate the wife adversely affected her welfare and the welfare of her family, these evils would, in all likelihood, be realized in Kentucky. The Kentucky compensation policy had a legitimate, not officious, claim to recognition.

The Ohio guest-statute cases, like the Indiana cases, emphasize the injustice of permitting the guest to sue the host for ordinary negligence.[17] In applying the interspousal immunity rule, the Ohio courts cite the dangers of collusion and marital discord.[18] Because the Arnetts had such close ties with Kentucky at the time of the accident and because of the great likelihood that they would, as they have, soon resume their Kentucky residence, there is substantial doubt as to the relevance of the Ohio host-protection and marital-harmony policies. The Arnetts' automobile was, however, principally garaged in Ohio and therefore the Ohio anti-collusion policy was legitimately applicable to help keep down Ohio liability insurance rates.

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[14] *Cf.* Fuerste v. Bemis, 156 N.W.2d 831, 833 (Iowa 1968) (Iowa guest statute, not Wisconsin negligence standard, applicable when Iowa guest injured in Wisconsin by Iowa host; "Wisconsin has no significant relationship with the parties nor any interest in any issue herein presented."). *But cf.* Conklin v. Horner, 157 N.W.2d 579 (Wis. 1968) (Wisconsin negligence rule rather than Illinois guest statute applicable when Illinois guests injured in Wisconsin by Illinois host).

[15] 433 S.W.2d at 112.

[16] Information supplied to Professor Sedler by attorney for Edna Arnett.

[17] *See, e.g.*, Duncan v. Hutchinson, 39 N.E.2d 140, 142 (Ohio 1942).

[18] Lyons v. Lyons, 208 N.E.2d 533, 535 (Ohio 1965).

The clash between the Ohio anti-collusion, the weakened Ohio host-protection and marital-harmony policies on one side and the Kentucky compensation policy on the other side was, under the neutral conflicts principles suggested in section I, properly resolved in favor of compensation. There is no clearly discernible trend toward repealing guest statutes,[19] but "[a]n increasing minority"[20] of courts are abandoning interspousal immunity in automobile accident cases. Moreover, the suggested presumption in favor of liability is not rebutted by any danger of surprise to either the husband or his liability insurer. The husband would not have driven more carefully in Kentucky, nor would he have purchased more or different liability insurance if he could have foreseen the application of the Kentucky negligence standard to determine his liability to his wife-passenger. The insurer is protected because the cost of defending the wife's suit against her husband and of paying the judgment will be counted in the loss experience of the appropriate Ohio rating district and affect insurance rates in that district. Moreover, this effect on insurance rates will occur before judgment, at the moment that the insurer's claims department decides that payment is sufficiently likely to

[19] Twenty-six states still have guest statutes: ALA. CODE tit. 36, § 95 (1958); ARK. STAT. ANN. §§ 75-914, 915 (1957); CAL. VEHICLE CODE § 17158 (1971); COLO. REV. STAT. ANN. § 13-9-1 (1964); DEL. CODE ANN. tit. 21, § 6101 (Cum. Supp. 1970); FLA. STAT. ANN. § 320.59 (1968); IDAHO CODE § 49-1401 (1967); ILL. ANN. STAT. ch. 95-½, § 9-201 (Smith-Hurd 1971); IND. ANN. STAT. § 47-1021 (1966); IOWA CODE ANN. § 321.494 (1966); KAN. STAT. ANN. § 8-122(b) (1964); MICH. COMP. LAWS ANN. § 257.401 (1967); MONT. REV. CODES ANN. § 32-1113 (1961); NEB. REV. STAT. § 39-740 (1968); NEV. REV. STAT. § 41.180 (1971); N.M. STAT. ANN. § 64-24-1 (1972); N.D. CENT. CODE §§ 39-15-01, 02, 03 (1960); OHIO REV. CODE ANN. § 4515.02 (Anderson 1967); ORE. REV. STAT. § 30.115 (1971); S.C. CODE § 46-801 (1962); S.D. COMPILED LAWS ANN. § 32-34-1 (1967); TEX. REV. CIV. STAT. ANN. art. 6701(b) (1969); UTAH CODE ANN. §§ 41-9-1, 2 (1970); VA. CODE ANN. § 8-646.1 (1957); WASH. REV. CODE ANN. § 46.08.080 (1972); WYO. STAT. ANN. § 31-233 (1959). Only the Vermont Statute has been repealed in recent years, VT. LAWS 1970, ch. 194. In Massachusetts, the former judicially created requirement of a showing of more than ordinary negligence for a guest passenger to recover against his host driver (Massaletti v. Fitzroy, 118 N.E. 168 (Mass. 1917)) has recently been changed by statute to an "ordinary negligence" standard. MASS. GEN. LAWS ANN. ch. 231, § 85L (Supp. 1973). A judicial requirement of more than ordinary negligence for guest-passenger recovery persists in Georgia (Hennon v. Hardin, 50 S.E.2d 236 (Ga. Ct. App. 1948)).

[20] Immer v. Risko, 267 A.2d 481, 482 (N.J. 1970) (abolishing interspousal immunity in automobile accident cases). For other recent decisions abrogating interspousal immunity, *see* Klein v. Klein, 58 Cal.2d 692, 26 Cal. Rptr. 102, 376 P.2d 70 (1962); Beaudette v. Frana, 173 N.W.2d 416 (Minn. 1969). *But see* Rubalcava v. Gisseman, 384 P.2d 389 (Utah 1963) (wife may not sue husband's estate for injuries suffered in automobile accident, overruling insofar as inconsistent Taylor v. Patten, 275 P.2d 696 (Utah 1954).

warrant including the estimated payment in the insurer's "loss reserves."[21]

The wife is also suing the driver of the other automobile, Mullins. If Mullins had been found liable, Kentucky law would permit Mullins to obtain contribution from his co-defendant.[22] Application of Ohio law, however, would insulate the host-husband from the co-liability on which contribution must be based.[23] Because Mullins is a Kentucky resident,[24] if Mullins had been found liable to the wife, Kentucky's liability-contribution policies would be strongly applicable. If Kentucky's contribution rule were applicable, this would provide an independent justification for refusing to apply the Ohio guest statute or interspousal immunity rule.[25] In this case, however, Kentucky's contribution policy is not applicable because the jury has exonerated Mullins.

In a case involving a host-husband and guest-wife who do not have the close ties with Kentucky that the Arnetts have, the desirability of applying the Kentucky negligence standard to determine the host-husband's liability to his guest-wife turns on whether the driver of the other car is liable to the guest-wife. Therefore, in such a case, the jury should either be given alternative instructions concerning the circumstances under which the host-husband can be found liable, or be instructed to render special verdicts on the various fact findings that will determine choice of law.

IV. FOSTER V. LEGGETT[26]

The immediately preceding discussion of *Arnett v. Thompson* would appear to adumbrate the answer to *Foster v. Leggett.* In

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[21] *See* McNamara, *supra* note 11, at 401; Stern, *supra* note 11, at 144-45.

[22] KY. REV. STAT. § 412.030 (1971); *cf. id.* § 454.040 (jury may assess joint or several damages against the defendants).

[23] *See, e.g.,* Pirc v. Kortebein, 186 F. Supp. 621 (E.D. Wis. 1960).

[24] *See* note 16 *supra.* Kentucky's liability-contribution policies would also be applicable if Mullins were not a Kentucky resident but a resident of a state with liability rules similar to those of Kentucky.

[25] *See* Taylor v. Bullock, 279 A.2d 585 (N.H. 1971); Saleem v. Tamm, 67 Misc.2d 335, 323 N.Y.S.2d 764, 766 (Sup. Ct. 1971) (refuses to "exonerate a co-defendant involved in an accident from liability by reason of his domicile, and hold other defendants in under the New York State Law"); Pierce v. Helz, 64 Misc.2d 131, 314 N.Y.S.2d 453 (Sup. Ct. 1970) (law of New York, not that of Florida domicile, applied to permit son to sue stepfather when other defendants are New York residents).

[26] 484 S.W.2d 827 (Ky. 1972).

Foster, because the defendant-host is an Ohio citizen, the Ohio guest statute policies (host-protection and anti-collusion) are applicable. Because the guest is a Kentucky resident, Kentucky's compensation policy also has a strong, not hypothetical, claim to recognition. The neutral bases for conflict resolution suggested in section I and applied in the discussion of *Arnett*, would point toward application of the Kentucky negligence rule.

There is, however, an additional problem in *Foster*. Does Kentucky have a sufficient nexus with the defendant or the defendant's course of conduct to make it fair and reasonable for Kentucky to assert its interest in compensation under Kentucky standards for the Kentucky guest?[27] For example, suppose that the Kentucky plaintiff was a pedestrian crossing an Ohio street when she was struck by an automobile driven by an Ohio resident. Assume that on one or more issues the Kentucky rules of liability and compensation are more favorable to the injured pedestrian than the Ohio rules. Even if the Ohio driver can be subjected to the jurisdiction of the Kentucky courts, by, for example, being served with process while temporarily present in Kentucky, Kentucky law should not be applied. Assertion of the Kentucky compensation interest based solely on the residence of the plaintiff and without any other connection between Kentucky and the defendant or the occurrence would be chauvinistic.[28] In *Foster*, however, there is more than ample nexus between Kentucky, the defendant, and the defendant's course of conduct, to make it reasonable and desirable that the conflict between Ohio and Kentucky law be resolved in favor of applying the Kentucky law. In guest-statute cases, even when the defendant does not have the close residential and social contacts with Kentucky that he had in *Foster*, Kentucky should be free to assert its compensation policy in favor of the Kentucky guest whenever the automobile

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[27] *See* Sedler, *supra* note 4, at 128.

[28] *See* Bannowsky v. Krauser, 294 F. Supp. 1204, 1206 (D. Colo. 1969) ("[T]he only contact that New Mexico has with the injury is the residence of the plaintiff in that state. . . . [I]t would be nothing short of arbitrary to apply New Mexico law."). *But see* Foster v. Maldonado, 315 F. Supp. 1179 (D.C.N.J.), *leave to appeal denied*, 433 F.2d 348 (3d Cir. 1970); Tjepkema v. Kenney, 31 A.D.2d 908, 298 N.Y.S.2d 175 (Sup. Ct.), *motion to appeal dismissed*, 24 N.Y.2d 942, 250 N.E.2d 68, 302 N.Y.S.2d 580 (1969); Mackendrick v. Newport News Shipbuilding & Dry Dock Co., 59 Misc.2d 994, 302 N.Y.S.2d 124 (Sup. Ct. 1969).

trip extends or is planned to extend into Kentucky, no matter where the collision occurs.[29]

V. CONCLUSION

The Court of Appeals of Kentucky is engaged in an exciting re-analysis of choice-of-law rules in tort cases. Ahead lie other conflicts problems, not only in torts, but also in other substantive fields. The Court will also wish to re-examine which matters should be considered "procedural" for conflicts purposes and which "substantive." I wish the Court well in these efforts and am confident that it will continue to demonstrate the flexible strength and heightened contemporary relevance of the common-law case system in the administration of justice.

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[29] Recent guest statute cases with an indication whether their holdings are consistent or inconsistent with the nexus standard here suggested: Pryor v. Swarner, 445 F.2d 1272 (2d Cir. 1971) (no liability, inconsistent); Bennett v. Macy, 324 F. Supp. 409 (W.D. Ky. 1971) (liability, consistent); Schneider v. Nichols, 158 N.W.2d 254 (Minn. 1968) (liability, consistent); Dow v. Larrabee, 217 A.2d 506 (N.H. 1966) (no liability, inconsistent); Cipolla v. Shaposka, 267 A.2d 854 (Pa. 1970) (no liability, inconsistent).